Filed 10/30/20 In re I.I. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re I.I., a Person Coming Under the Juvenile Court Law.	B300371 Los Angeles County Super. Ct. No. MJ24293
THE PEOPLE, Plaintiff and Respondent, v. I.I., Defendant and Appellant.	

APPEAL from a judgment of the Juvenile Court of Los Angeles County, William A. Crowfoot, Judge. Affirmed.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, David E. Madeo and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Minor I.I. admitted the allegations of a petition charging him with possession of a firearm and of live ammunition after the juvenile court denied his motion to suppress that evidence. On appeal, I.I. contends the officer who found the loaded revolver in I.I.'s pocket detained and searched him without the reasonable suspicion required by the Fourth Amendment and *Terry v. Ohio* (1968) 392 U.S. 1. We conclude that—taking into account the "totality of the circumstances" known to the officer when he grabbed I.I.'s arm and patted him down for weapons—the record established "some objective manifestation" that I.I. might "be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231 (*Souza*).) We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *I.I.'s three arrests and the People's three petitions*

On May 22, 2018, the People filed a petition under section 602 of the Welfare and Institutions Code[1] alleging five counts against minor I.I., including second degree commercial burglary, attempted second degree commercial burglary, grand theft of a firearm, and possession of a firearm by a minor. I.I. (born in March 2004) was 14 at the time. On August 8, 2018, the People filed a second petition, alleging first degree residential burglary. On September 10, 2018, I.I. admitted the allegations of the August petition. The court ordered I.I. removed from his mother's custody and placed in a suitable out-of-state facility. The court dismissed the May 2018 petition.

In late October 2018, I.I. was placed at an academy in Iowa. In mid-March 2019, I.I. returned to California and was placed with his mother in San Bernardino County. On March 28, 2019,

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[1] References to statutes are to the Welfare and Institutions Code.

I.I. left home without permission. Neither his mother nor the probation department knew where he was. The juvenile court issued a bench warrant for I.I.'s arrest.

On April 11, 2019, I.I. appeared before the juvenile court in Los Angeles County with his mother, as a "bench warrant walk-in." The court recalled the warrant and transferred the case to the juvenile court in San Bernardino County.

On July 23, 2019, I.I. was arrested shortly after midnight by the Los Angeles County Sheriff's Department in Palmdale. On July 24, 2019, the People filed a third section 602 petition alleging possession of a firearm and of live ammunition by a minor. I.I. appeared on July 25 before the juvenile court in Los Angeles County, which appointed the public defender to represent him.

2. *I.I.'s suppression motion*

On August 1, 2019, I.I.'s counsel filed a motion under section 700.1 to suppress his "identity," his statements, "the fact of [his] arrest," and "its fruits," including a black revolver and ammunition. The motion stated I.I. "was minding [his] own business, walking down the highway" in Palmdale, when police "seized" him, "interrogated" him, arrested him, and "collected" the gun and ammunition without a warrant. On August 9, 2019, the District Attorney filed an opposition to the motion.

The juvenile court conducted an evidentiary hearing on the motion on August 27, 2019. Los Angeles County Sheriff's Department Deputy Agustin Vargas testified he and his partner were patrolling in the area of Jacklin Avenue and Avenue Q-2 in Palmdale around 12:30 a.m. on July 23, 2019. It was a residential area and "kind of dark" at that hour. Vargas had been on patrol about a month and a half at the time.

Vargas saw I.I. cross Avenue Q-2. Vargas first testified I.I. crossed at an intersection but then stated, "He was crossing

between the streets, not at marked posted signs or traffic lights." There was very little traffic at that hour; maybe one car and "maybe none" went by. Vargas decided "[j]ust to make contact with [I.I.] regarding the issue of jaywalking."

I.I. stopped in front of a two-door Toyota Scion parked at the curb. The driver's and passenger's doors were "wide open." Two males were in the car—in the driver's and passenger's seats—and Vargas saw "two females" outside the car whom he believed to be juveniles. The deputies stopped their patrol car a few feet behind the Toyota. Vargas got out of the patrol car; he smelled "the odor of burnt marijuana" coming from the Toyota.

As Vargas approached, I.I. "ended up clutching both his hands towards [the front of] his waistband." In Vargas's experience, that means "that someone is trying to conceal something, whether it's narcotics, knife, gun." I.I. started walking away, between the patrol car and the Toyota. As he walked within about a foot of Vargas, Vargas "grabbed" him, "from his elbow area, going down to his wrist area." I.I. was detained but not under arrest. Vargas asked I.I. if he had anything illegal on his person and he said he did not.

I.I. again "clutched for his waistband." Vargas then handcuffed I.I. and conducted a pat-down search for weapons. Vargas "discovered what to be [*sic*] a butt of a weapon" in I.I.'s front right-side pocket. Vargas could feel the cylinder and "the barrel length of the revolver." Vargas removed the gun from I.I.'s pocket. The revolver was loaded with two .357 rounds.

Defense counsel presented an aerial photograph of the area showing that "none of the intersections [is] controlled by a traffic light." Counsel argued I.I. had not jaywalked within the meaning of Vehicle Code section 21954, which requires pedestrians outside of a marked crosswalk at an intersection to yield to any vehicle near enough "to constitute an immediate hazard." (Veh. Code,

§ 21954, subd. (a).) Counsel noted there had been "no need" for I.I. to yield to the patrol car when crossing the street.

Counsel contended the marijuana smell emanating from the Toyota did not justify Vargas's detention of I.I. because there was no evidence I.I. "was involved in that activity"; he merely walked up to the car and "almost immediately" tried to walk away. Counsel argued Vargas's testimony that I.I. was reaching for his waistband did "not make much sense," noting nothing was found in I.I.'s waistband. Counsel stated, "[T]he Supreme Court of the United States has made it abundantly clear that unless a police officer has reasonable suspicion to conduct an investigatory stop, an individual has a right to ignore the police and go about his business." Counsel argued Vargas had not testified to "specific and articulable facts that would support a reasonable suspicion of criminal activity" on I.I.'s part.

The prosecutor argued any good faith, reasonable but mistaken belief by Vargas that I.I. had jaywalked did not render the detention unlawful, citing *Heien v. North Carolina* (2014) 574 U.S. 54; the smell of marijuana and the presence of individuals who appeared to be juveniles[2] justified Vargas's "further investigation . . . to see what was going on"; I.I.'s attempt to walk away was "evasive behavior," especially in light of I.I.'s "path that intersected with [Vargas's] own"; and I.I.'s "clutching [of] his waistband" was "quite relevant" to a reasonable suspicion that I.I. might have a weapon.

After listening to argument, the court denied the suppression motion. The court noted that, from the officers' perspective, I.I. appeared to be walking "purposeful[ly]" across the street in the direction of the Toyota. The court stated

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[2] The prosecutor noted Palmdale has a municipal ordinance setting a curfew for minors under the age of 18.

Vargas and his partner had "ample reason to be curious about what's going on with that car," given the "collection of people," including two apparent juveniles, at that early hour. Vargas's "reasonabl[e]" desire to make "some further inquiry" "rapidly bec[a]me a concern" when I.I. walked toward the patrol car—heading between that car and the Toyota—and clutched his waistband.

The court noted I.I.'s movement toward his waistband might "not be as significant" standing alone, "but for all of the other circumstances, the time of day, the purposeful crossing of the street to the car, the smell of marijuana, the two juveniles waiting outside of the car with open doors with two other guys inside the car." The court concluded "all of these circumstances then combined with [I.I.'s] particular action" to give rise to Vargas's "reasonable articulable suspicion" that I.I. had "some sort of [ ] contraband," justifying "an officer-safety search, frisk."

After the court denied the suppression motion, I.I. admitted the allegations of the petition and the court sustained it. The court ordered I.I. to be placed in a camp-community program for a term of five to seven months.

DISCUSSION

The Fourth Amendment prohibits "unreasonable searches and seizures." A temporary detention of a person is a "seizure" within the meaning of the Fourth Amendment and a "frisk" is a search. (*Terry v. Ohio, supra*, 392 U.S. at pp. 8, 16.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in the light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza*, *supra*, 9 Cal.4th at p. 231.)

In assessing the reasonableness of a detention, courts must take into account "the totality of the circumstances—the whole picture." (*United States v. Cortez* (1981) 449 U.S. 411, 417-418.) Courts must view the evidence "as understood by those versed in the field of law enforcement" (*id.* at p. 418), and "permit officers to make 'commonsense judgments and inferences about human behavior.' " (*Kansas v. Glover* (2020) __ U.S.__, 140 S.Ct. 1183, 1188, quoting *Illinois v. Wardlow* (2000) 528 U.S. 119, 125.) Experienced police officers have "both the right and the duty to make reasonable investigation of all suspicious activities even though the nature [of them] may fall short of grounds sufficient to justify an arrest or a search of the persons or the effects of the suspects." (*People v. Cowman* (1963) 223 Cal.App.2d 109, 117.) An officer " 'need not rule out the possibility of innocent conduct.' " (*Navarette v. California* (2014) 572 U.S. 393, 403.) " 'Although a mere "hunch" does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.' " (*Kansas v. Glover*, *supra*, 140 S.Ct. at p. 1187.)

"To decide whether relevant evidence obtained by assertedly unlawful means must be excluded . . . , we look exclusively to whether its suppression is required by the United States Constitution." (*People v. Glaser* (1995) 11 Cal.4th 354, 363; *Souza, supra,* 9 Cal.4th at p. 232.) In the trial court, the prosecution has the burden of proving the validity of a temporary detention by a preponderance of the evidence. (*United States v. Matlock* (1974) 415 U.S. 164, 177-178 & fn. 14; *People v. Superior Court (Bowman)* (1971) 18 Cal.App.3d 316, 321; Evid. Code, § 115.) On review of a denial of a suppression motion, we view the evidence in the light most favorable to the order denying the motion. (*People v. Ellis* (1993) 14 Cal.App.4th 1198, 1200.) We

must draw all presumptions in favor of the trial court's ruling, upholding its findings if substantial evidence supports them. (*People v. Fulkman* (1991) 235 Cal.App.3d 555, 560.) The trial court has the duty to decide whether—on the facts it has found—the search was reasonable within the meaning of the Constitution. On appeal, "it becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness." (*People v. Lawler* (1973) 9 Cal.3d 156, 160.)

I.I. contends he did not violate the Vehicle Code by crossing the street midblock when there was no traffic; therefore, he says, everything that followed was unlawful, from the moment Vargas and his partner stopped their patrol car behind the Toyota. I.I. reads the governing law too narrowly.

I.I. argues he did not violate Vehicle Code section 21954, subdivision (a), because he did not fail to "yield the right-of-way" to any "vehicles upon the roadway so near as to constitute an immediate hazard." (Veh. Code, § 21954, subd. (a).) I.I. speculates Vargas may have meant to cite Vehicle Code section 21955, which prohibits pedestrians from crossing the roadway outside of a crosswalk "[b]etween adjacent intersections controlled by traffic control signal devices." (Veh. Code, § 21955.) I.I. notes there were no traffic signals at the intersections on either side of where he crossed the street. The Attorney General does not argue I.I., by crossing the street where he did, in fact violated the Vehicle Code.

But the question is not whether the officers permissibly stopped their patrol car when Vargas saw I.I. cross the street. The question is whether the totality of the circumstances known to Vargas when he "seized" I.I. by grabbing his arm, and searched him by patting him down, justified that seizure and search. (*United States v. Malik* (9th Cir. 2020) 963 F.3d 1014, 1015,

citing *United States v. Ped* (9th Cir. 2019) 943 F.3d 427, 431 ["the 'assessment of probable cause' takes into account 'the totality of the circumstances known to the officers *at the time of the search*' " (italics added)].) Even assuming Vargas did not have probable cause to cite I.I. for jaywalking when his partner stopped their patrol car and Vargas got out just after I.I. crossed the street, Vargas's subsequent observations provided reasonable suspicion justifying his seizure and search of I.I.

"[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street . . . ." (*Florida v. Royer* (1983) 460 U.S. 491, 497.) Therefore, the officer's observations during the approach are lawful and may provide grounds for a detention. (*People v. Rosales* (1989) 211 Cal.App.3d 325, 330 [an officer may approach a citizen, identify himself, and ask questions "even without any objective justification"; defendant's conduct—putting his hand into his bulging pocket—"escalated" "[t]he encounter" and "created an appearance of potential danger to the officer"].)

Here, Vargas and his partner pulled their patrol car "next to where [I.I.] ended up stopping" after he crossed the street. According to Vargas—whose testimony was uncontradicted—I.I. did not cross east or west of the Toyota as if heading up or down the street but, instead, "stopped at the vehicle." Vargas saw two males sitting in the Toyota with both doors open, and two girls or young women who appeared to be juveniles standing outside the car. As soon as Vargas got out of the patrol car, he smelled "the odor of burnt marijuana." As the Attorney General notes, the possession and consumption of cannabis is legal only for those 21 and older. (Health & Saf. Code, § 11362.1.) Driving under the influence of marijuana also is illegal, as is driving while in possession of an open container of marijuana. (Veh. Code, §§ 23152, subd. (f); 23222, subd. (b)(1). Cf. *People v. McGee*

(2020) 53 Cal.App.5th 796, 804-805 [unsealed bag of marijuana in car established probable cause to search car; possession of open container of cannabis while driving or riding in motor vehicle remains illegal].)

As Vargas approached the car and the five individuals, including I.I., I.I. "clutch[ed] both his hands towards his waistband" at the front. I.I. "started walking away from the vehicle and the other people around the vehicle." He got "within a foot or so" of Vargas. At that point, the "seizure" began: Vargas grabbed I.I. by the arm, using "a control hold." When I.I. clutched his waistband again, Vargas patted him down as "an officer-safety matter for [him]self and also as well as safety for the people around [him]." Vargas "discovered" the "butt of a weapon," which turned out to be a loaded revolver.

In sum, considering the " 'totality of the circumstances' " of this case to determine whether the detaining officer had a " 'particularized and objective basis' " for grabbing I.I.'s arm and then patting him down, we are satisfied Deputy Vargas had a reasonable suspicion that criminal activity was occurring or was about to occur. While it was I.I.'s (apparently lawful) crossing of the street that first drew Vargas's attention, Vargas quickly discovered individuals who appeared to be juveniles on a dark street in the middle of the night, surrounding a car that emitted the smell of burnt marijuana. I.I. did not walk east or west or continue on his way, but stopped at the car. While Vargas's observations perhaps could be explained by an innocent interpretation, the Supreme Court of the United States has warned against this sort of "divide-and-conquer" analysis. (*United States v. Arvizu* (2002) 534 U.S. 266, 273-275.)

DISPOSITION

We affirm I.I.'s sustained petition.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.